TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 300.

JONATHAN STURGES, JOSIAH S. BENNET, FREDERICK STURGES, AND BENJAMIN G. ARNOLD, PLAINTIFFS IN ERROR,

vs.

JOHN H. DRAPER AND HENRY DRAPER, EXECUTORS, ETC., OF SIMEON DRAPER, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 19, 1870.

Court on the first Monday in December next, pursuant to an appeal filed

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Writ of error	*a*	1
Clerk's certificate	*b*	1
Agreed statement of facts	1	2
Decision	5	3
Exceptions	9	4
Assignment of errors	11	4
Joinder in errors	13	4
Judgment record	15	5
Notice of appeal	27	8
Bond for costs on writ of error	29	9
Citation	31	10

a UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Jonathan Sturges, Josiah S. Bennet, Frederick Sturges, and Benjamin G. Arnold, plaintiffs in error, and John H. Draper and Henry Draper, executors, &c., of Simon Draper, late collector of the customs of the United States at the port of New York, def'ts in error, a manifest error hath happened, to the great damage of the said Jonathan Sturges, Josiah S. Bennet, Frederick Sturges, & Benjamin G. Arnold, as is said, and as appears by the complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States the ninety-fourth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed. October 28, 1870.
SAM'L BLATCHFORD, *District Judge.*

b U. S. circuit court, south'n dist. of New York, 2d circuit.

JONATHAN STURGES, JOSIAH S. BENNET, Frederick Sturges, & Benjamin G. Arnold, pl'ffs in error,
vs.
JOHN H. DRAPER ET AL., EXECUTORS OF SIMON Draper, deceased, late collector, &c., def't in error.

By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, do hereby certify that the following pages, numbered from one to twenty-eight, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Jonathan Sturges et al., plaintiffs in error, ag'st John H. Draper et al., executors of Simon Draper, deceased, late collector, &c., def'ts in error, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 3d day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

[SEAL.] KENNETH G. WHITE,
Clerk, &c.

[Five-cent internal revenue stamp affixed and canceled.]

1 U. S. circuit court, southern district of New York.

JONATHAN STURGES ET AL.
vs.
JOHN H. DRAPER AND HENRY DRAPER, EXECUTORS, &c., of Simeon Draper, late collector of customs of the United States at the port of New York. } Agreed statement of facts.

It is agreed by the parties that the following are the facts of this case:

This is an action of assumpsit for money paid by the plaintiffs for duties upon a quantity of indigo imported into the port of New York on the 7th day of July, 1865, from London, England, the same being the product of India, a country east of the Cape of Good Hope; that the said Simeon Draper, the late collector of the port, charged and exacted as duties thereon ten per centum ad valorem; that on the 17th day of July, 1865, the plaintiffs paid the said duties under protest, and on the 27th day of July, 1865, appealed from the decision of the said collector to the Secretary of the Treasury, and on the 11th day
2 of September, 1865, the Secretary affirmed the decision of the said collector, of which the plaintiffs had due notice.

It is further agreed that the protest, notice, & appeal of the plaintiffs were all made in due time and in due form of law, and no objection was taken thereto at the trial.

Dated New York, September 13, 1870.

ANDREW R. CULVER,
Plaintiffs' Counsel.

New York, Sept. 13th, 1870.

NOAH DAVIS,
U. S. District Attorney, for the Defendants.

3 This case came on for trial in February, 1867, when the facts as stated in the foregoing agreement appeared in evidence, and were not controverted.

After the evidence was in, the court directed a verdict for defendants, subject to the opinion of court upon a case to be made; and by consent of counsel it was ordered that if the court should thereafter determine that the ten per cent. was illegally exacted, judgment should be entered for the plaintiffs for a sum then agreed upon.

The case was subsequently elaborately argued on paper, and after careful consideration in July last, the court ordered a judgment to be entered for the defendants, to which the plaintiffs except, and the exceptions are allowed and ordered to be filed.

D. A. SMALLEY, *Judge.*

(Endorsed:) U. S. circuit court, southern district of New York. Jonathan Sturges et als. vs. John H. Draper and Henry Draper, ex'rs, &c.,

of Simeon Draper, collector, &c. Statement of facts. Andrew R. Culver, pl'ffs' att'y, No. 30 Pine st., N. Y. Filed Oct. 25, 1870.

4

5 United States circuit court, southern district of New York.

JONATHAN STURGES & AL.
vs.
JOHN H. DRAPER AND HENRY DRAPER, executors of Simeon Draper, late collector of customs at the port of New York.

SMALLEY, J.:

This is an action of assumpsit for money paid by the plaintiffs for duties upon a quantity of indigo, which the plaintiffs claim was illegally exacted by Simeon Draper, late collector of the port of New York. Upon the trial it appeared that the plaintiffs imported, on the 7th day of July, A. D. 1865, into the port of New York, from London, England, a quantity of indigo, the production of a country east of the Cape of Good Hope; that Mr. Draper, as collector, charged and exacted duties thereon, ten per cent. ad valorem. On the 17th of said July the plaintiffs paid said duties under protest, and on the 27th day of same July appealed from the decision of the said collector to the Secretary of the Treasury; and on the 11th day of September, A. D. 1865, the
6 Secretary affirmed the decision of the collector, of which the plaintiffs had due notice. The protest, notice, and appeal of the plaintiffs were all made in due time, and in due form of law, and no objection was taken thereto.

By consent of counsel the court directed a verdict for the defendant, subject to the opinion of the court, upon a case to be made; and with the further consent of counsel, that in case the court should hereafter determine that the ten per cent. was illegally exacted, judgment should be rendered for the plaintiffs for a sum then agreed upon.

This case has been very elaborately and ably argued in the brief presented by the plaintiffs' counsel; and if it was a new or even an open question, the court would, perhaps, have taken their view of it. But the case of Hadden vs. The Collector of New York, which was decided by the Supreme Court of the United States since the case was tried, though pending at the time, (reported 5th Wallace, 107,) is decisive of and must control this.

They are in principle the same; one was a case of silk, the
7 other of indigo, both the produce of countries east of the Cape of Good Hope; one imported from London, the other from Liverpool, England, into the port of New York.

The 14th section of the act of 1862, (12th Stat., 557,) under which the silks in the Hadden case were imported, and the 6th section of the act of 3rd March, 1865, (13th Stat., 493,) under which the importation of the indigo in this case was made, are precisely alike, only as to raw cotton and raw silk, which are excepted, and the word "and" after the word "ad valorem" omitted in the latter act.

I do not see how the slight omission of the word "and" can change the construction given by the Supreme Court to the act of 1862.

Following, therefore, the decision in that case, which the court is bound to do, the judgment in this case must be entered for the defendant, and it is so ordered.

(Signed) D. A. SMALLEY, *Judge.*

8 (Indorsed:) U. S. circuit court, southern dist. of N. Y. Jonathan Sturges & al. vs. John H. Draper and Henry Draper, executors, &c., &c. Decision. Filed July 2, 1870. Copy.

9 U. S. circuit court, southern district of N. Y.

JONATHAN STURGES ET ALS.
vs.
JOHN H. DRAPER AND HENRY DRAPER, executors, &c., of Simeon Draper, late collector of the customs of the United States at the port of New York. } Exceptions.

And now the plaintiffs' attorney and excepts to the ruling and judgment of the court herein as erroneous in this, to wit, because upon the agreed statement of facts herein filed the plaintiff was entitled by law to recover the aforesaid amount of four hundred and fifty-eight dollars and fifty-five cents, whereas the court ordered judgment for the defendants.

ANDREW R. CULVER,
Att'y for Plaintiffs.

10 (Endorsed:) U. S. circuit court, southern district of New York. Jonathan Sturges et als. vs. John H. Draper and Henry Draper, ex'rs, &c., of Simeon Draper, late collector, &c. Exception. A. R. Culver, att'y for pl'ffs.

11 U. S. Supreme Court.

JONATHAN STURGES ET AL., PL'FFS IN ERROR,
vs.
JOHN H. DRAPER AND HENRY DRAPER, EXECutors, &c., of Simeon Draper, late collector of the customs of the United States at the port of New York, def'ts in error. } Assignment of errors.

And now the plaintiffs' counsel comes and assigns for error, in the rendition of the judgment of the circuit court as aforesaid, the error set forth in the exception to the said judgment filed by order of the court, at the October term of the said circuit court, at which the said judgment was entered.

ANDREW R. CULVER,
Att'y for Plaintiff in Error.

12 (Endorsed:) U. S. circuit court, southern district of New York. Jonathan Sturges et al. vs. John H. Draper and Henry Draper, ex'rs, &c., of Simeon Draper, late collector, &c. Assignment of errors. A. R. Culver, att'y for pl'ffs.

13 U. S. Supreme Court.

JONATHAN STURGES ET AL., PL'FFS IN ERROR,
vs.
JOHN H. DRAPER AND HENRY DRAPER, EXECutors, &c., of Simeon Draper, late collector of the customs of the United States at the port of New York, def'ts in error. } Joinder of errors.

And now comes the said defendant by his attorney, and denies that

there is any error in the judgment aforesaid, as set forth in the said exceptions, and affirms that judgment herein was rightfully entered for the defendants as aforesaid.

NOAH DAVIS,
Attorney for Defendant in Error.

14 (Endorsed:) U. S. circuit court, southern district of New York. Jonathan Sturges et al. vs. John H. Draper and Henry Draper, exr's, &c., of Simeon Draper, late collector, &c. Joinder of error. A. R. Culver, pl'ffs' att'y.

15 U. S. circuit court for the southern district of New York.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, of the term of October, 1866, to wit, of the thirteenth day of December, in the year of our Lord one thousand eight hundred and sixty-six.

Witness the Honorable David A. Smalley, one of the judges of the said circuit court.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the thirteenth day of December, 1866, in October term of the same year, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, came Jonathan Sturges, Joseph D. Bennet, Frederick Sturges, and Benjamin G. Arnold, by A. R. Culver, their attorney, and brought into the said court, before the aforesaid judges thereof then there, their certain declaration against John H. Draper and Henry Draper, executors of Simeon Draper, deceased, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

16

17 United States circuit court for the southern district of New York, in the second circuit, of October term, in the year of our Lord one thousand eight hundred and sixty-six.

Jonathan Sturges, Josiah S. Bennet, Frederick Sturges, & Benjamin G. Arnold, plaintiff in this action, by Andrew R. Culver, complain of John H. Draper & Henry Draper, executors, &c., of Simeon Draper, late collector of the customs of the United States at the port of New York, defendant in this action, of a plea of trespass on the case upon promises, &c.:

For that whereas the said defendant, on the 17th day of August, in the year one thousand eight hundred and 65, at the district aforesaid, was indebted to the said plaintiffs in the sum of 600 dollars, lawful money of the United States of America, for so much money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of the said defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaint-

iffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiffs in the further sum of 600 dollars, like lawful money as aforesaid, for so much money before that time paid, laid out, and expended by the said plaintiffs to and for the use of the said defendant, and at the like special instance and request of said defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the further sum of 600 dollars, like lawful money as aforesaid, for money before that time had and received by the said defendant, to and for the use of the said plaintiffs; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiff the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of 600 dollars like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff, the said defendant in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of 1,200 dollars, and therefore the said plaintiffs brings suit, &c.

18

19 Name of importer: Sturges, Bennet & Co.
Description of merchandise: S. B., $\frac{66}{106}$, 41 chests indigo.
Place from whence imported: London.
Name of vessel: Steamship "Atalanta."
Date of invoice: June 12, 1865, London.
Date of entry at custom-house: July 7th, 1865.
Amount of duty paid in excess: Four hundred & fifty-five $\frac{60}{100}$ dollars.

Date of payment of duty: July 7th, 1865.
Date of filing protest: July 17th, 1865.
Date of appeal to the Secretary of the Treasury: July 27th, 1865.
Date of answer of the Secretary of the Treasury: September 11th, 1865.

20

21 Supreme court, city and county of New York.

JONATHAN STURGES & AL.
against
SIMEON DRAPER, LATE COLLECTOR OF THE customs of the United States at the port of New York. } Bill of particulars.

SIR: Please to take notice that the following is the bill of particulars of items of the plaintiffs' demand in the above-entitled action, to wit, moneys exacted by compulsion and duress, and under color of the revenue law of the United States, by the defendant as collector as aforesaid, from and paid by the plaintiff as follows, on merchandise, as per statement hereto annexed, with legal interest on said amount from the date of payment thereof as aforesaid.

Dated October , 1866.

Yours, &c.,

ANDREW R. CULVER,
Plaintiffs' Attorney, No. 30 Pine Street, New York.

S. G. COURTNEY, *Defendant's Attorney.*

22 (Indorsed:) E, 352. N. Y. supreme court. 2900, O. S. Jonathan Sturges et al. against Simeon Draper, late collector of the customs of the United States at the port of New York. Bill of particulars. Andrew R. Culver, attorney for plaintiff, No. 30 Pine street, N. Y. To S. G. Courtney, esq., def't's att'y.

23 U. S. circuit court, southern district of New York.

JOHN H. DRAPER AND HENRY DRAPER, as executors of Simeon Draper, deceased,
ads.
JONATHAN STURGES & AL. } Plea.

And the said defendants, John H. Draper and Henry Draper, as executors of Simeon Draper, by Samuel G. Courtney, their attorney, come and defend the wrong and injury, when, &c., and say that they did not undertake and promise in manner and form as the said plaintiff in this suit hath above thereof declared against the said defendants, and of this they put themselves upon the country. And the said plaintiff doth the like, &c.

To ——— ———, Esq., *Plaintiffs' Attorney.*

24

25 Therefore the issue above joined is ordered by the said court to be tried at the circuit court appointed to be held at the United

States court buildings, in the city of New York, on the 15th day of February, in the year 1867.

At which day and place, before David A. Smalley, esquire, one of the judges of the said circuit court, according to the form of the statute in such case made and provided, come as well the said plaintiffs as the said defendants by their respective attorneys aforesaid, and the jurors of the jury summoned to try the said issue being summoned also come, who, to speak the truth of the matters aforesaid being chosen, tried, and sworn, say upon their oath that the said defendants did not undertake and promise in manner and form as the said plaintiffs have complained against them.

Therefore it is considered that the said plaintiffs take nothing by their said declaration, but that they be in mercy, &c.; and that the said defendants do go thereof without day, &c. And it is further considered by the said court now here that the said defendants do recover against the said plaintiffs forty-nine $\frac{47}{100}$ dollars for his costs and charges by them about their defence in this behalf laid out and expended by the said court here adjudged to the said defendants, and with their assent, according to the form of the statute in such case made and provided; and that the said defendants have execution thereof, &c.

Judgment signed this 25th day of October, 1870.

RICHARD E. STILWELL,
Deputy Clerk.

26 (Indorsed:) Vol. 6, page 108. U. S. circuit court. John H Draper & al., ex'rs of Simeon Draper, dec'd, ads. Jona. Sturges & al. Judgment record. Noah Davis, attorney for defendants. Costs, $49 47. Filed Oct. 25th, 1870.

27 U. S. circuit court.

JONATHAN STURGES ET AL.
vs.
JOHN H. DRAPER AND HENRY DRAPER, executors, &c., of Simeon Draper, late collector of the customs of the United States at the port of New York.

SIR: Please to take notice that by a writ of error issued out Oct. 28th, 1870, the judgment in this case is removed for revision into the Supreme Court of the United States, and the said writ of error, with the return thereon, will be entered in the Supreme Court of the United States, at the term to be begun and holden at the city of Washington on the first Monday of December, eighteen hundred and seventy.

Dated New York, October 31st, 1870.

Yours, &c.,

ANDREW R. CULVER,
Att'y for Plaintiffs, 30 Pine Street, New York.

To KENNETH G. WHITE, Esq.,
Clerk U. S. Circuit Court Southern District of New York.

28 (Endorsed:) U. S. circuit court, southern district of New York, Jonathan Sturges et al. vs. John H. Draper and Henry Draper. ex'rs, &c., of Simeon Draper, late collector, &c. Notice of appeal.

A. R. Culver, att'y for pl'ffs. To Kenneth G. White, esq., clerk U. S. circuit court.

29 Circuit court of the United States of America for the southern district of New York, in the second circuit.

JONATHAN STURGES ET AL., PLAINTIFFS IN error,
vs.
JOHN H. DRAPER AND HENRY DRAPER, EXECutors of Simeon Draper, late collector of the customs of the United States at the port of New York, defendants in error. } Bond for costs.

Know all men by these presents that we, Allan C. Washington & Theodore B. Moore, are held and firmly bound unto the above-named John H. Draper et al., def'ts in error, in the sum of five hundred dollars, to be paid to the said def'ts in error; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the twenty-sixth day of October, in the year of our Lord one thousand eight hundred and seventy.

Whereas the above-named Jonathan Sturges et al., pl'ffs in error, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Jonathan Sturges et al. shall prosecute said writ of error to effect, and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

A. C. WASHINGTON. [L. S.]
THEO. B. MOORE. [L. S.]

Sealed and delivered, and taken and acknowledged, this 26 day of October, 1870, before me.

JOHN A. SHIELDS,
U. S. Com'r.

30 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Allan C. Washington & Theodore B. Moore, being duly sworn, each depose and say, & each for himself saith, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

A. C. WASHINGTON.
THEO. B. MOORE.

Sworn to this 26th day of October, A. D. 1870, before me.

JOHN A. SHIELDS,
U. S. Com'r.

(Indorsed:) Vol. —— page ——. U. S. Supreme Court. Jonathan Sturges et al., pl'ffs in error, vs. John H. Draper et al., def'ts in error. Bond for costs on writ of error. ——— ———, proctor.

I am satisfied with the within sureties as good and sufficient.
Oct. 28, 1870.

N. DAVIS,
U. S. Att'y, & Def't's Att'y.

Filed this 31 day of October, 1870.

31 By the Honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to John H. Draper and Henry Draper, executors, &c., of Simeon Draper, late collector of the customs of the United States at the port of New York, defendants in error.

Whereas Jonathan Sturges et al., the plaintiffs in error, have brought and prosecuted a writ of error, lately issued out of the Supreme Court of the United States, and said writ of error directed to the judges of the circuit court of the United States for the southern district of New York, in the second circuit, stating that in the record and proceedings as also in the rendition of the judgment of a plea in the said court before the judge thereof between the said Jonathan Sturges et al., plaintiffs in error, and John H. Draper & Henry Draper, executors, &c.,
32 of Simeon Draper, late collector of the customs of the United States at the port of New York, defendants in error, a manifest error hath happened to the great damage of the said plaintiffs:

And whereas, for the correction of that error in due manner, the said writ has been issued returnable at the next stated term of the Supreme Court of the United States, at the city of Washington, on the first Monday of December next:

You are therefore hereby cited to appear before the said Supreme Court at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the 2d circuit, the 28th day of October, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

SAM'L BLATCHFORD.

33

34 Service of a copy of within is admitted.
New York, Oct. 31, 1870.

NOAH DAVIS,
Def't's Att'y.

(Indorsement on cover:) No. 300. Jonathan Sturges, Josiah S. Bennet, Frederick Sturges, and Benjamin G. Arnold, plaintiffs in error, vs. John H. Draper and Henry Draper, ex'ors, &c., of Simeon Draper, dec'd, late collector of the port of New York. S. New York C. C. U. S.
Filed 19th November, 1870.

No. 532.

Supreme Court

OF THE UNITED STATES.

JONATHAN STURGES, ET ALS.,
Plaintiffs in Error.

vs.

JOHN H. DRAPER and HENRY DRAPER, Executors, &c. of SIMEON DRAPER, late Collector of Customs of the United States, at the Port of New York.

Defendants in Error.

BRIEF FOR THE PLAINTIFFS IN ERROR.

ANDREW R. CULVER,
Of Counsel for Plaintiffs in Error.

New York:
J. O. SEYMOUR, KENNARD & HAY, PRINTERS AND STATIONERS,
89 Liberty Street.
1870.

Supreme Court

OF THE UNITED STATES.

JONATHAN STURGES, *et als.*,
Plaintiffs in Error,

vs.

JOHN H. DRAPER and HENRY DRAPER, executors, &c., of Simeon Draper, late Collector of the Customs of the United States, at the Port of New York,
Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

STATEMENT.

This action which was pending in the Circuit Court of the United States for the Southern District of New York, came on for trial on the 15th day of February, 1867, before his Honor Justice Smalley, and a jury.

Upon the trial it appeared in evidence, that the plaintiffs in error imported at the port of New York, on the 7th day of July, 1865, in the steamship *Atalanta*, from London, a certain quantity of *indigo*, the production of a country east of the Cape of Good Hope.

That the late Collector of the said port, Mr. Draper, charged and exacted a duty of ten per cent. *ad valorem*, upon said indigo.

That the duty, as demanded, was paid on the 7th day of July, 1865, amounting to four hundred and thirteen dollars and sixty cents ($413 60).

That on the 17th day of July, 1865, the plaintiffs in error protested against the exaction and payment as follows, viz.:

To SIMEON DRAPER, Esq.,
Collector, &c.:

"Sir,—We hereby protest against the liquidation of "the duties, as made by you upon our entry of indigo, "per ship *Atalanta*, from London, dated July 7th, 1865, "and against the payment of the duties, as assessed, "demanded and exacted by you thereon."

"The grounds of our objection are:

"That the duty of ten per cent. imposed by you upon "said entry, under the provisions of the 6th section of "the Tariff Act of March 3d, 1865, is illegal, for the "reason that it can be applied only to such articles of "merchandise as by law are subject to a duty, and can- "not be applied to articles of merchandise otherwise "free."

2d. "That the ten per cent. duty provided for by said "section, 'is in addition to duties imposed,'—and as "there are no duties imposed by law upon the said "merchandise, the said ten per cent. cannot be in ad- "dition to any duties imposed; and, therefore, the said "merchandise should be admitted to entry free of any "duty whatever.

"We also protest against the payment of any and all "duties not legally chargeable upon said importation, "and hereby especially reserve all questions of law or "fact that may arise.

"Being under compulsion and duress, we pay the "amount of duties demanded and exacted by you, in "order to obtain possession of our goods, and hereby "notify you that we shall hold yourself and the United "States jointly and severally liable for the excess "exacted; and also notify you that we intend this pro- "test to apply to all future similar exactions.

"Dated New York, July 8th, 1865.

"Very respectfully,

"STURGES, BENNET & Co.,

"By A. R. Culver, their Atty."

That on the 27th day of July, 1865, the plaintiffs

appealed from the decision of the Collector to the Hon. Secretary of the Treasury, as follows, to wit:

"New York, July 27th, 1865.

"Hon. HUGH MCCULLOUGH,
"Secretary of the Treasury,
"Washington:

"Sir,—Please to take notice, that in accordance with "the requirements of the act of June 30th, 1864, we "hereby appeal from the decision of the Collector of the "Customs of the United States at this port, upon the "assessment of duty as made by him upon our importa- "tion of indigo per ship *Atalanta*, from London, dated "July 7th, 1865, for the reasons and upon the grounds, "set forth in our protest served upon said Collector.

"Very respectfully,
"Your obed't serv'ts,
(Sd.) "STURGES, BENNET & Co.,
"By A. R. CULVER,
"their Attorney."

That the Secretary of the Treasury denied plaintiffs' appeal, and affirmed the decision of the Collector, as follows, to wit:

TREASURY DEPARTMENT,
September 11th, 1865.

Gentlemen,—"Your appeal (§2,563), dated July 27th, "1865, from the decision of the Collector at New York, "assessing 'additional duty' at t[illegible] 10 per cent. "on certain indigo imported by [illegible] "from Liverpool, on the 7th of J[illegible]

"The indigo in question being t[illegible] "cast of the Cape of Good Hope, [illegible] "this side of the Cape of Good Hope, duty was assessed "under section 6th of Act approved March 3d, 1865.

"The decision of the Collector is hereby affirmed."

I am, very respectfully,
By order, J. F. HARTLEY,
Asst. Sec'y of the Treasury.

To Messrs. STURGES, BENNET & Co.,
New York.

To Simeon Draper, Esq.,
Collector, &c.:

"Sir,—We hereby protest against the liquidation of "the duties, as made by you upon our entry of indigo, "per ship *Atalanta*, from London, dated July 7th, 1865, "and against the payment of the duties, as assessed, "demanded and exacted by you thereon."

"The grounds of our objection are:

"That the duty of ten per cent. imposed by you upon "said entry, under the provisions of the 6th section of "the Tariff Act of March 3d, 1865, is illegal, for the "reason that it can be applied only to such articles of "merchandise as by law are subject to a duty, and can-"not be applied to articles of merchandise otherwise "free."

2d. "That the ten per cent. duty provided for by said "section, 'is in addition to duties imposed,'—and as "there are no duties imposed by law upon the said "merchandise, the said ten per cent. cannot be in ad-"dition to any duties imposed; and, therefore, the said "merchandise should be admitted to entry free of any "duty whatever.

"We also protest against the payment of any and all "duties not legally chargeable upon said importation, "and hereby especially reserve all questions of law or "fact that may arise.

"Being under compulsion and duress, we pay the "amount of duties demanded and exacted by you, in "order to obtain possession of our goods, and hereby "notify you that we shall hold yourself and the United "States jointly and severally liable for the excess "exacted; and also notify you that we intend this pro-"test to apply to all future similar exactions.

"Dated New York, July 8th, 1865.

"Very respectfully,

"Sturges, Bennet & Co.,

"By A. R. Culver, their Atty."

That on the 27th day of July, 1865, the plaintiffs

appealed from the decision of the Collector to the Hon. Secretary of the Treasury, as follows, to wit:

"New York, July 27th, 1865.

"Hon. HUGH MCCULLOUGH,

"Secretary of the Treasury,

"Washington:

"Sir,—Please to take notice, that in accordance with "the requirements of the act of June 30th, 1864, we "hereby appeal from the decision of the Collector of the "Customs of the United States at this port, upon the "assessment of duty as made by him upon our importa- "tion of indigo per ship *Atalanta*, from London, dated "July 7th, 1865, for the reasons and upon the grounds, "set forth in our protest served upon said Collector.

"Very respectfully,

"Your obed't serv'ts,

(Sd.) "STURGES, BENNET & Co.,

"By A. R. CULVER,

"their Attorney."

That the Secretary of the Treasury denied plaintiffs' appeal, and affirmed the decision of the Collector, as follows, to wit:

TREASURY DEPARTMENT,

September 11th, 1865.

Gentlemen,—"Your appeal (§2,563), dated July 27th, "1865, from the decision of the Collector at New York, "assessing 'additional duty' at the rate of 10 per cent. "on certain indigo imported by you per ship *Atalanta*, "from Liverpool, on the 7th of July last, is received.

"The indigo in question being the product of a country "east of the Cape of Good Hope, imported from a place "this side of the Cape of Good Hope, duty was assessed "under section 6th of Act approved March 3d, 1865.

"The decision of the Collector is hereby affirmed."

I am, very respectfully,

By order, J. F. HARTLEY,

Asst. Sec'y of the Treasury.

To Messrs. STURGES, BENNET & Co.,

New York.

That the United States' appraisers appraised the said indigo, and endorsed the following report upon the invoice:

S. B. 100.
Chest indigo (free).
(Product country east of Cape of Good Hope, 10 pr. ct.)
July 14th, 1865.

J. PHILLIPS.

VERDICT.

By consent of counsel, the Court directed the jury to find a verdict for the defendants, subject to the opinion of the Court upon a case to be made, with the further consent of counsel, that in case the Court should hereafter determine that the ten per cent. was illegally exacted, then a judgment shall be rendered for the plaintiffs for the sum of four hundred and thirteen dollars and sixty cents principal, and forty-four dollars and ninety-five cents interest.

BRIEF FOR THE PLAINTIFFS IN ERROR.

The Act of March 3d, 1865, Sec. 6 (13 Statutes at Large, page 493), under the provisions of which the defendant levied and collected the duties upon the plaintiffs' importations, is as follows:

"*And be it further enacted*, That there shall be "hereafter collected and paid ~~on~~ all goods, wares and "merchandise of the growth or produce of countries "[east] of the Cape of Good Hope, (except raw cotton "and raw silk as reeled from the cocoon, or not further "advanced than tram thrown or organzine) when im- "ported from places west of the Cape of Good Hope, a "duty of ten per centum *ad valorem*, in addition to "the duties imposed on any such article when imported "directly from the place or places of their growth or "production."

Introduction.

I.—The duty imposed by this section is dependent or one in addition to the duties imposed on merchandise when imported directly from the place or places of production. The defendant, in levying the duty complained of by the plaintiffs, failed to make this distinction, and regarded the duty imposed by this section as special or independent, and attaching to all merchandise of the growth or produce of countries (east) of the Cape of Good Hope (except raw cotton and raw silk, as reeled from the cocoon, or not further advanced than tram thrown or organzine), when imported from places west of the Cape of Good Hope.

The plaintiffs contend that under the provisions of the foregoing section, the merchandise imported by them is not liable to duty and should be admitted to entry *as free goods*, under the 23d section of the Act of March 2d, 1861; 12 Statutes at Large, page 196.

A reference to antecedent statutes and judicial opinions, repealed and recognized in the law of 1865, under which the defendant assessed and collected the *disputed* duty, not only fortify, but conclusively demonstrate the illegality of the exaction, and the correctness of the interpretation maintained by the plaintiffs, to wit: That the discriminating ten per cent. duty, provided in this law of 1865, only attaches to dutiable merchandise.

Antecedent Statutes and Decisions

II.—Act of July 14th, 1862, Section 14, 12 Statutes at Large, page 557, is as follows:

"And be it further enacted, That from and after the "day and year aforesaid (August 1st, 1862), there shall "be levied, collected and paid on all goods, wares and "merchandise of the growth or produce of countries be-"yond the Cape of Good Hope, when imported from "places this side of the Cape of Good Hope, a duty of "ten per cent. ad valorem, *and* in addition to the duties "imposed on any such articles when imported directly "from the place or places of their growth or production."

Under this Act a question arose, whether or not *raw silk*, admitted to have been free of duty at the time of the passage of the Act, and must therefore have been *raw silk*, not double, twisted or advanced in manufacture in any way, was liable or chargeable with a duty of ten per cent. ad valorem, under the foregoing section.

The case of Hadden v. Barney was brought before the Court to determine this question, and came on for trial before his Honor Justice Nelson, in the Circuit Court of the United States, for the Southern District of New York, in November, 1863.

The following is the decision of the Circuit Court:

OPINION.

NELSON, C. J.: The question in this case arises under the Fourteenth Section, of the Act of Congress, of July 14th, 1862, which is as follows:

That from and after the day and year aforesaid (August 1st, 1862), there shall be levied, collected and paid on all goods, wares and merchandise of the growth or produce of countries beyond the Cape of Good Hope, a duty of ten per cent. ad valorem, *and*, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production.

Several shipments have been made by the plaintiffs since the passage of this act, from England, of raw silk, the produce of Persia and China, upon which this ten per cent. duty has been imposed, and paid under protest. This suit was brought to recover back the same, as illegally exacted.

It is admitted that, at the time of the passage of the act, raw silk was free of duty, and it is claimed on the part of the importers that, upon the true construction of the fourteenth section, the ten per cent. duty is imposed, and was intended to be imposed, only upon such articles, the growth or produce of countries beyond the Cape of Good Hope, as at the time were liable to the payment of duties; in other words, was intended as an additional

duty, and did not, therefore, embrace articles which were duty free. The previous sections of this act undoubtedly lend some countenance to this construction. Many of them are devoted to the imposition of additional duties upon articles enumerated, and which were before liable to duty, and others impose duties in lieu of those heretofore imposed, and also "on such as may now be exempt from duty," specially enumerating the articles. It is claimed that, in these sections, the additional duty is limited to such articles only as were previously liable to duty; and, when intended to subject to duty any articles which were exempt, they were mentioned in express terms.

It is not to be denied that, if this fourteenth section is to be construed as intended to extend the principle, which seems to have governed Congress in the adjustment of the duties in the previous portion of the act, to articles the growth or produce of countries beyond the Cape of Good Hope, but imported from places this side of it, the raw silk of the shipments in question would not be included, but would remain free of duty.

The phraseology of this section, however, is different, and may bear a different construction. The first clause imposes the duty of ten per cent. in express terms, upon all goods, &c., the growth or production of countries beyond the Cape, when imported from places this side of it—and the latter clause does not necessarily qualify it, so as to exclude or to take out of it the free articles. "And in addition to the duties imposed on any such articles, when imported directly from the place or places of their growth or production," may, we think, well enough mean, that such articles as already pay a duty under existing acts of Congress, the ten per cent. duty imposed by the section shall be in addition. The phrase "any such articles," in the connection found, does not necessarily mean all such articles as are covered by the first clause, but may be regarded as limited to the class there covered, which were already chargeable with duty. As to these, the ten per cent. shall be in addition. This view satisfies the clause, and makes it consistent with the broad and unlimited terms of the first. I agree the section is obscure, and its

true meaning a matter about which different minds are likely to arrive at different conclusions.

Some light may be reflected upon this section from an amendment of it by the act of 3d March, 1863, some seven months after its passage. The 2d section of that act modified this 14th section "so as to allow cotton and raw silk, etc., of the growth or produce of countries beyond the Cape of Good Hope, to be exempt from any additional duty, when imported from places" this side of it, for two years. These two articles were exempt from duty under the Act of March 2d, 1861, and were so at the time of the passage of the Act of 14th July, 1862. The duty imposed by the fourteenth section of that act, therefore, was not an additional duty, as seems to have been supposed by Congress from their amendment. They were mistaken in supposing that the ten per cent. was an additional duty, but the amendment clearly indicate that Congress understood this ten per cent. duty had been imposed by the fourteenth section, and the two acts, being *in pari materia*, help to interpret each other.

We are inclined, therefore, not without some difficulty, to hold, that raw silk, the article in question, was subject to a duty of ten per cent. under the fourteenth section of the act referred to; and as the shipments of the plaintiffs occurred before the modification of the section, the duty was properly levied, notwithstanding this objection.

Another objection is taken by the counsel for the plaintiffs, involving the constitutionality of this fourteenth section, founded upon the following position of the case:

As we have seen, the ten per cent. duty is imposed upon articles the growth or produce of countries beyond the Cape of Good Hope, when shipped from places this side of it, as, in the present instance, from England. Goods coming from China or Persia, the country of the products in question, to the ports of the United States on the Atlantic, whether carried round the Cape of Good Hope, or across the country by the way of Constantinople, would be in relation to the Atlantic ports, the products of countries beyond the Cape, and chargeable with the discriminating duty. But the same goods carried

from either of these countries, in the usual course of trade, in the opposite direction to ports on the Pacific coast, would not be articles of the growth or produce of countries beyond the Cape. As to these ports, the countries of production would be this side of the Cape, and hence, not within the words of the act imposing the discrimination. And, if so, the duties upon the articles imported into the Atlantic ports would be ten per cent. greater than when imported into ports on the Pacific, which would be in violation of the provision of the Constitution forbidding a preference of the port of one State over that of another.

The only answer that we need give for the present to this objection is, it will be found on looking through the several tariff acts, that the phraseology, "beyond the Cape of Good Hope," is used as an equivalent for east of the Cape of Good Hope; and in seven instances the latter phrase is used instead of the former, and even both phrases in the same act, to express the same idea; and hence, over whatever portion of the globe the goods may be carried, whether direct to the Pacific, or round the Cape to the Atlantic ports, they are the growth or produce of countries east of the Cape, and therefore subject to the increased duty.

Judgment for defendant.

The practical discrimination of Judge Nelson, which meets the constitutional objection to this fourteenth section is further exhibited in the construction of its provisions imposing duties. He says: "The first clause" imposes in express terms a duty upon all goods, etc., the growth or production of countries beyond the Cape, when imported from places this side of it. "And in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production," may, we think, well enough mean, that such articles as already pay a duty under existing acts of Congress—the ten per cent. duty imposed by the section shall be in addition. Under this construction, the first clause of the section imposes a general and independent

duty. Its last, or second provision, imposes a particular or dependent duty on articles not covered by the first clause. As to these, the ten per cent. shall be in addition. This view (Judge Nelson's remarks) satisfies the second clause of the section, "and makes it consistent with the broad and unlimited terms of the first."

The judicial construction given to the fourteenth section of the Act of July 14, 1862, under which "free goods" are made liable to duty, and the objectionable phraseology, "beyond the Cape of Good Hope," being used as the equivalent for "East of the Cape of Good Hope," was without doubt the occasion of the subsequent legislation removing the objections and defects of the law in these particulars.

On June 30th, 1864 (seven months after this decision), Congress repealed the fourteenth section of the Act of July 14, 1862, and substituted in lieu thereof section 18 (13 Statutes at Large, page 216), which is as follows:

"*And be it further enacted*, That on and after the "day and year this Act shall take effect, there shall be "levied, collected and paid on all goods, wares and "merchandise of the growth or produce of countries "east of the Cape of Good Hope (except raw cotton), "when imported from places west of the Cape of Good "Hope, a duty of ten per centum *ad valorem*, in addition "to the duties imposed on any such articles when im-"ported directly from the place or places of their "growth or production. *Provided*, That section three "of the Act approved August five, eighteen hundred "and sixty-one, entitled 'An Act to provide increased "revenue from imports to pay interest on the public "debt, and for other purposes;' and Section fourteen "of the Act approved July fourteen, eighteen hund-"red and sixty-two, entitled 'An Act increasing, "temporarily, the rates of duties on imports, and for "other purposes,' be, and the same are hereby re-"pealed."

By comparing this new or substituted provision with

the one repealed, it is submitted that Congress plainly recognized the opinion of Judge Nelson, in the case of Hadden *v.* Barney: (1) The substituted provision annuls the general or independent duty, which Judge Nelson holds is imposed in express terms in the first clause of the repealed law; (2) The substituted provision retains the particular or dependent duty (being one in addition) which, in the construction given to the second clause of the repealed law, was imposed under it; (3) The substituted provisions avoid the objectionable phraseology, and adopts the precise language of Judge Nelson in reference to the countries of growth or production; (4) The meaning of the substitute is plain, as the obscurity of the repealed law is removed by the suggested distinctions between the *two enactments.*

If the repealed law had been in force at the time of the exaction by the defendant of the duties complained of by the plaintiffs, it is conceded that different minds might arrive at different conclusions in relation to the legality of the exaction; but under the existing law, it examined in the light of the opinion of Judge Nelson, on which it is evidently founded, it is submitted that the ten per cent additional duty only attaches to dutiable merchandise.

The Act of June 30, 1864, continued in force until the passage of the Tariff Act of March 3d, 1865, before cited, the construction of which is now under consideration.

DIFFERENCE BETWEEN THE ACTS OF 1864 AND 1865.

III.—By a comparison of the two Acts of 1864 and 1865, it will be observed that they differ only by the addition in the Act of 1865 of the words, "*and raw silk as reeled from the cocoon, or not further advanced than tram thrown or organzine,*" which follow immediately after the words "*raw cotton,*" in the Act of 1864. In other words, the Act of 1865 re-enacts the Act of 1864, and exempts raw silk *as reeled from the cocoon, not further advanced than tram thrown or or-*

ganzine, in addition to raw cotton, which was exempted by the Act of 1864.

It is maintained, on behalf of the plaintiffs, that the provisions of the 6th section of the Act of March 3d, 1865, can be applied only to merchandise upon which duties "are imposed," and cannot be applied to merchandise otherwise exempt from duty.

IV.—INDIGO.—The article assessed by the defendant being exempted from duty (Sec. 23, 12 Statutes at Large, page 196), it is submitted that the ten per cent. charged and exacted by the collector was illegal.

1st. The provisions of the 6th Section of the Act of '65, should be applied only to merchandise subject to a duty.

(*a.*) The ten per cent provided to be collected and paid, is to be *in addition* to *the* duties imposed, &c., &c., and the Act assumes that there are some duties imposed, to which the ten per cent. shall be in addition —a condition precedent (so to speak), to give the statute any life or operation whatever, is that there are some duties imposed to which the ten per cent. shall be in addition. The words used by Congress are "in addition to the duties imposed on any such articles," &c., &c.

(*b.*) There being no duty imposed by law upon the article of indigo, the ten per cent. discriminating duty provided by the Act of 1865, cannot be applied as by the express language of the statute, the ten per cent. to be collected and paid is to be *in addition to the* duties imposed.

(*c*) The language of the statute being plain, clear and unambiguous, and there being no room for interpretation or construction, the will of Congress, as ascertained from the acts themselves, must be obeyed.

Fisher *vs.* Blight, 2 Cranch, 358.
Case *vs.* Mildridge, 4 Indiana, 51.

Newell *vs.* The People, 3 Seld., Ct. App. 97.
Sedgwick on Stat. and Con. Law, p. 231, and cases cited.
Bosley *vs.* Mattingly, 14 Kentucky, 89.

2d.—By reference to the 18th section of the act of June 30th, 1864, it will be observed that Congress expressly exempted *raw cotton* from the additional duty imposed by its provisions.

And also by the Act of March 3d, 1865, Sec. 6, (*raw cotton*, and *raw silk* as reeled from the cocoon, or *not further advanced* than *tram*, *thrown or organzine*) are exempted from the additional duty of ten per cent.

Should it be said, that if Congress intended to exempt indigo from the ten per cent. additional duty imposed by the Acts of 1864 and '65, why not have enumerated it when specially exempting raw cotton and raw silk in those acts: the answer is, that at the time of the passage of the Acts of '64 and '65, raw cotton and *the* raw silk which is specially exempted in those acts, were liable to a duty.

Congress, wishing to exempt the two articles of merchandise, viz.: "*raw silk not more advanced in manufacture than tram, thrown or organzine*," and "raw cotton," from the additional duty of ten per cent., found it necessary to specially exempt them by name, as they were liable to a duty at the time of the passage of the acts imposing the additional duty of ten per cent. Had either or both of these articles been free of duty, such special exemption would not have been necessary.

Raw Cotton.—Act July 14th, 1862, Sec. 8, 12 Statutes at Large, page 551, imposed a duty of half of one cent per pound on raw cotton.

Act June 30th, 1864, Sec. 6, 13 Statutes at Large, page 208, increased the duties upon raw cotton to two cents per pound.

By the Act of March 3d, 1865, Sec. 3, 13 Statutes at Large, page 493, the duty upon raw cotton was still further increased to five cents per pound.

Raw Silk.—Raw silk, or as reeled from the cocoon, *not being doubled, twisted or advanced in manufacture* in *any way*, was exempted from duty by the Act of March 2d, 1861, Sec. 23, 12 Statutes at Large, page 196.

Raw Silk in the gum, not more advanced in manufacture than single tram, and thrown or organzine, was liable to a duty of twenty-five per cent. ad valorem.

Act August 5th, 1861, Sec. 2, 12 Statutes at Large, page 203.

By the Act of June 30th, 1864, Sec. 8, 13 Statutes at Large, page 210, the duty on raw silk, not further advanced than *single tram, and thrown or organzine*, was increased to thirty-five per cent.

It is submitted, on behalf of the plaintiffs, that the special exemption of the article of raw cotton from the act of 1864, and of raw cotton, and raw silk not further advanced than *single tram, thrown or organzine*, from the act of 1865, both of which articles were liable to a duty at the time of the passage of the respective acts, affords a conclusive argument, if any is needed, that Congress understood that merchandise free of duty was not liable or chargeable with the ten per cent. additional duty imposed by those acts.

By a critical examination of the act of 1865, it will be seen that the raw silk which is exempted from the additional duty levied by that act (in addition to raw cotton), was raw silk *not further advanced than tram, thrown or organzine*. And by reference to the act of August 5th, 1861, Sec. 2, it will be seen that raw silk of this description was liable to a duty of twenty-five per cent. ad valorem, which was increased to thirty-five per cent. ad valorem, by the act of June 30th, 1864, Sec. 8. Raw silk, *not being doubled, twisted or advanced in manufacture in any way*, was exempt from duty by the act of March 2d, 1861, Sec. 23, *which is still in force;* for this reason, Congress, in the act of 1865, has carefully avoided any reference to raw silk in its *crude or unmanufactured state* (which is free of duty), and applied the exemption

to raw silk which has passed beyond that state by further preparations or manufacture, *as such raw silk only* was a dutiable article.

V. To foster commerce, no less than to obtain revenue and encourage incidentally manufactures, is plainly the policy of our tariff laws.

Congress, by legislation covering a long period of years, has indicated and defined a certain general policy which governs it in adjusting the rates of duties upon imports, and in determining what articles shall be free of duty. That policy may be stated thus:

1st—To levy high rates of duty upon articles and merchandise of foreign production or manufacture, which come into competition with the same or similar articles or merchandise produced or manufactured in the United States.

2d—To exempt from duty, articles or merchandise in a raw or crude state, which cannot be grown or produced in the United States, and which are necessarily required for manufacturing purposes, thereby furnishing freight for our ships.

The following is the preamble of the first Tariff Act passed by the first Congress assembled under the Constitution, July 4th, 1789:

"Whereas, It is necessary for the support of the "Government, for the discharge of the debts of the "United States, and the encouragement and protection "of manufactures, that duties be levied on goods, wares, "and merchandise imported.

"Be it enacted," &c., &c.

Statutes at Large, Vol. 1, page 24.

By an examination of the Tariff Acts in force, it will be seen that the only articles of merchandise, the growth and production of countries east of the Cape of Good Hope, which are admitted to entry in the United States free of duty (except raw silk not being doubled, twisted

or advanced in manufacture in any way), are crude articles used for tanning or dyeing.

Those articles are *indigo, tumeric, red sanders wood and sapan wood.* None of these articles are, or can be produced in the United States, with the exception of indigo, which before the late rebellion was produced in the State of South Carolina, but only in very limited quantities, and during, and since the war, it is believed the production of the article in that State has entirely ceased. The articles enumerated not only being absolutely required by manufacturing establishments in the United States, who are obliged to compete with manufactories of other countries, and it being impossible to produce them, or a substitute therefore in the United States; it is submitted that it was not only the policy, but the design of Congress, in the interest of commerce, to exempt those articles from the payment of any customs duties.

As Congress wishes to foster an honest and honorable commerce by its laws, no less than to obtain revenue, it is neither the true policy nor the right of departments, or of the Courts, nor is it presumed to be their desire, to *thwart the views of Congress*, or embarrass mercantile business when not attended by equivocation and fraud, or to throw doubts or difficulties *over the liberal course proper to be pursued* generally towards the community in any branch of trade.

Marriott *v.* Brune, 9 Howard, 633, 634.

VI.—By reference to the opinion of his Honor Justice Nelson, it will be observed that the Court stated that the phraseology of the 14th Section of the Act of 1862, was obscure, and its true meaning a matter about which different minds are likely to arrive at different conclusions.

And the Court above * in affirming the decision of the Court below, say,

"Looking to the section by itself, we find no little "difficulty in its construction. The first clause declares

* Hadden *v.* Barney, 5 Wallace, page 107.

"that upon *all* goods, wares and merchandise, the "growth or product of countries beyond the Cape of "Good Hope, when imported from places this side of "the Cape, a duty of ten per cent. *ad valorem* shall be "levied, and the latter clause does not qualify this "general language so as to exclude from it the articles "previously exempt. It only provides, as we construe "it, that the duty laid by the ~~last~~ first clause shall be in "addition to existing duties imposed on such articles "when imported directly from their places of growth or "production; in other words, that such articles as already "pay a duty when imported directly from these places, "shall pay a further duty if imported from places this "side of the Cape; its object being to increase the duty "upon the articles when not imported directly from their "places of growth or production. The words 'any such "articles' do not mean all the articles embraced in the "first clause, but only such of them as were already "subject to duty."

The difficulty which existed, however, as to the proper construction of the 14th Section of the Act of July 14th, 1862, was remedied by Congress in June, 1864, by the enactment of Section 18 of that Act, as a substitute for the 14th Section of the Act of '62, leaving out in the latter Act the word "*and*," substituting the word "*east*" for "*beyond*," the words "*west of*" in place of the words "*this side*," and repealing in terms the Act of July 14th, 1862. This repeal of the 14th Section of the Act of '62, and the substitution of the 18th Section of the Act of June, 1864, in its stead, took place seven months after the decision of his Honor Justice Nelson, in the case of Hadden *et al. vs.* Barney, and Congress being aware of the construction which had been put upon the 14th Section of the Act of 1862, by the Courts, legislated upon the subject, repealed the Act of '62, enacted a new section, and used different language in the latter Act, for the purpose of placing the intentions of Congress beyond the possibility of a doubt.

The fact that the word "*and*" in the Act of 1862, was left out of the Act of 1864; that the word "*east*" was

substituted in the Act of 1864, for the word "*beyond*" in the Act of 1862; the words "*west of*" in the Act of 1864, substituted for the words "*this side*" in the Act of '62; and that the decision of his Honor Justice Nelson, in the case of Hadden *vs.* Barney, turned upon the proper construction of the Act of July 14th, 1862, in consequence of the presence of the very words in the Act of 1862, which are either left out or changed in the Act of '64, and that Congress in '64, repealed the Act of '62, and substituted a new Act, and have used language which is clear and unambiguous, puts the construction of the Acts of '64 and '65, beyond any doubt, they cannot be made applicable to other than merchandise *already dutiable.*

Mr. Justice Field, who delivered the opinion of the Supreme Court in this case, suggests that the modification of the 14th Section of the Acts of July 14th, 1862, by the Amendatory Act of March 3d, 1863, passed a few months afterwards, indicates very clearly the understanding of Congress that the ten per cent. was imposed as an additional duty, though in fact raw silk, as already stated, was at the time exempt. Its language is that the 14th section shall be modified so as to allow "cotton and raw silk, as reeled from the cocoon, to be exempt from any *additional* duty when imported from places this side of the Cape of Good Hope, for two years" from the passage of the Act.*

If the raw silk as reeled from the cocoon was doubled, twisted, or advanced in manufacture in any way, it was liable to duty, and Congress might properly include it with cotton in the exemption from additional duty.

Whether this amendatory Act is incorrect or not in this particular, it nevertheless is indicative of the understanding of Congress, that even under the law of 1862, the discriminating ten per cent. duty only attached to dutiable merchandise. The construction of the Act of 1865, contended for by the plaintiffs, is merely carrying out the original purpose of Congress, that the duty imposed was merely additional and dependant.

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* Statutes 12 Vol., page 742.

STATUTORY CONSTRUCTION.

VII.—*In case of doubt* (and it must be admitted that, in the most favorable view that can be taken, it is a question of great doubt whether the duties charged and exacted in this case are legally collectable) *between the authority* and the *individual*, the *benefit of the doubt*, all other reasons being equal, ought to be given to the individual, and not to the authority.

Liebers 17. Rule of Con. of Statutes. Sedg. on Stat. and Con. Law, p. 289.

"If he who could, and ought to have explained himself clearly and fully, has not done it, it is the worse for him." *This is a maxim of the Roman Law.*

Vattels Rule of Con. and Statute. Sedg. on Statutes and Con. Law, p. 266.

Another rule has been almost universally applied by the Courts in the construction of the revenue laws.

"Statutes levying duties on citizens or subjects are to be construed *most strongly against the Government* and *in favor of the citizen or subject*, and their provisions are not to be extended by *implication* beyond the clear import of the language used.

U. S. *vs.* Wigglesworth, 2 Story, C. C. R., 369. U. S. *vs.* Morse, 3 Story, C. C. R., 87.

DOUBTFUL INTERPRETATIONS NOT TO BE FAVORED.

"Laws imposing duties are never construed beyond the natural import of the language used, and duties are never imposed upon the citizens upon *doubtful* interpretations, for every duty imposes a burden upon the public at large, and is construed strictly and must be made out in a *clear and determinate manner* from the *language of the statute*."

Adams *vs.* Bancroft, 3 Sumner, C. C. R., 387. Powers *vs.* Barney, per Nelson, C. J., C. C. So. Dist. of N. Y., November Term, 1863.

"*The reason of the law or of the treaty, that is to say, of the motive which led to the making of it, is the most certain clue to lead us to the discovery of its true meaning.*"

Vattels Rule of Con. of Statutes.
Sedgwick on Statutes Con. Laws, p. 272.

"When a Statute is revised, some parts being omitted, the parts omitted are to be considered as annulled."

Pingree *vs.* Snell, 42 Maine, 53.

"A Statute revising the whole subject-matter of a former Statute, and evidently intended as a substitute for it, will operate as a repeal of the former Statute, although it contains no express words to that effect."

Farr *vs.* Brackett, 30 Vt. (1 Shaw), 344.

If a subsequent Statute professes, or manifestly intends, to regulate the whole subject to which it relates, it repeals all former Statutes so far as it differs from them.

Gorham *vs.* Luckett, 6 B Mon., 146.
Davies *vs.* Fairbairn, 3 Howard, 636.
D. & L. Plank Road Company, *vs.* Allen, 16 Barbour, 15.
Ill. & Mich. Canal *vs.* Chicago, 14 Illinois, 342.

"While it is the duty of the Courts in construing Statutes to give effect to the intent of the law-making power, and to seek for that intent in every legitimate way, yet it is to be *sought first of all in the words and*

language employed, and if the words are free from ambiguity, and express clearly the sense of the framers, there is no occasion to resort to other means of interpretation."

The natural and obvious meaning should be taken without resorting to subtile and forced construction.

Liebers Pol. and Leg. H. 87.
2 Ruth, Inst., chap. 7, sec. 2.
Stor. Const., sec. 292.
4 Hill, 328.
20 Wendell, 561.
Court of Appeals, 1854.
McCloskey *vs.* Cromwell, N. Y. (1 Ker.), 593.

Revenue and duty Acts are to be construed according to the true import and meaning of their terms, and when the legislative intention is ascertained, that and that only, is to be our guide, in interpreting them.

U. S. *vs.* Breed, 1 Sumner, C. C. R., 160.

The late Chancellor Bibb, when Secretary of the Treasury, in a circular addressed to Collectors and Naval Officers of the Customs, dated August 5th, 1844, says:

"The sovereign power of taxation is the source from whence the most wide-spread wrongs, oppressions and ruin of the people flow, in all governments. The safeguard against abuse of the taxing power of government intended by our Constitution, is in confiding that power to the Congress. It would ill-become the Executive Department to take money from the pockets of the people by implication and constructive enlargement of the acts of the Legislature. When the Congress, in the exercise of their power of taxation, have not spoken expressly and clearly—when the words of the law leave room for rational doubt as to a higher or lower rate of taxation—the decision of the executive officers should be in favor of the lower rate. In so doing, the executive action is

certainly within the limit prescribed by law. To take the highest rate of taxation, in such dubious cases, would be hazarding a supplement to the legislative will, and an inroad into the region of the legislative department. Such a mode of construction by the executive department would not be lenient and remedial, but onerous and penal."

CONCLUSION.

VIII. The plaintiffs in error submit their case upon the following propositions:

1st—That the language of the 18th Section of the Act of June 30th, 1864, and of the 6th Section of the Act of March 3, 1865, being clear and unambiguous, and there being no room for interpretation or construction, the will of Congress, as plainly expressed and ascertained from the acts themselves must be obeyed.

2d—That the provisions of the 18th Section of the Act of June 30th, 1864, and of the 6th Section of the Act of March 3d, 1865, do not apply to merchandise otherwise exempt from duty, but apply only to merchandise upon which *duties are imposed*, this being the only construction that can be placed upon those sections, consistent with the clear language used.

3d—That the special exemption of *raw cotton* in the Act of 1864, and of *raw silk*, as reeled, &c., &c., in the Act of 1865, both of which articles were dutiable at the time of the passage of the respective acts, conclusively confirms the construction claimed by the plaintiffs in error, that free goods were not intended to be affected by the provisions of those acts.

4th—That Congress, in passing the 18th Section of the Act of June 30th, 1864, repealing the Act of 1862, intended to remove the doubts and difficulties which had arisen as to the proper construction of the 14th Section of the Act of 1862, and, in so doing, have used language in the Act of 1864, that places the meaning intended by that act, and of the Act of 1865, beyond a doubt.

5th—That the decision of the Courts of the United States, in the case of Hadden *vs.* Barney, supports the

plaintiffs view of the case, the point in that action being the ambiguity of the 14th Section of the Act of 1862, caused by the presence in it of words that are either left out, or are changed, by the 18th Section of the Act of 1864, and the 6th Section of the Act of March 3d, 1865.

6th—That, by the repeal of the 14th Section of the Act of 1862, and the substitution of an entirely new act in 1864, upon the same subject matter, Congress has removed all doubts and difficulty as to the true meaning of the Acts of 1864 and 1865, by leaving out or changing the only words in the Act of 1862 which made the latter act obscure and ambiguous.

ANDREW R. CULVER,
Attorney and of Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

JONATHAN STURGES and others,
Plaintiffs in Error,
vs.
JOHN H. DRAPER and another,
Executors.
} No. 300.

In error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE DEFENDANTS IN ERROR.

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BRIEF FOR THE DEFENDANTS IN ERROR.

STATEMENT.

This is an action against the executors of the late Collector of the Port of New York, to recover $413 60 exacted as a 10 per cent. *ad valorem* duty upon a quantity of indigo, the product of a country east of Cape of Good Hope, and which was imported into York, on the 7th of July, 1865, in the steamship anta, from London The plaintiffs in error con- d, in the court below, that under the 23d section e act of March 2, 1861, (12 Stat. at Large, 196,) was exempted from duty; and that the act of h 3, 1865, § 6, (13 Stat. at Large, 493,) did not e duties on merchandise at that time exempted duty.

ARGUMENT.

By section 14 of the act of July 14, 1862, (12 Stat. at Large, 557, 558,) it was enacted, that from and after the 1st of August, 1862, "there shall be levied, collected, and paid on all goods, wares, and merchandise, of the growth or produce of countries beyond the Cape of Good Hope, when imported from places this side of the Cape of Good Hope, a duty of ten per cent. *ad valorem*, *and* in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

This court, (affirming the decision of Mr. Justice Nelson in the Circuit Court,) held that the above section imposed a duty on articles otherwise included within its provisions, although at the time of its passage they were exempt from duty.

Hadden *vs.* The Collector, 5 Wallace, 107.

In the opinion delivered in that case, the court lay some stress upon the fact that Congress, by an act passed a few months after, March 3, 1863, (12 Stat. a Large, 742,) clearly showed that, in its understandi the 14th section of the act of July 14, 1862, ap to the free list, by enacting that the section sl be so modified as "to allow cotton and raw s reeled from the cocoon, of the growth or prod countries beyond the Cape of Good Hope, to be e from any additional duty when imported from this side of the Cape of Good Hope, for two years and after the passage of this act."

These two acts being *in pari materia*, must be construed together; and thus construed, it is clear that, after the 3d of March, 1863, articles included in the free list were liable to the 10 per cent. additional duty, without any aid from the decision of this court in Hadden *vs.* The Collector. But these two acts, taken in connection with that decision, places the interpretation to be set upon the subsequent legislation of Congress on this subject beyond a doubt.

The interpretation put upon the act of July 14, 1862, became a part of the statute itself, and when Congress, in subsequent statutes, used the same, or substantially the same language, the legal presumption is that it intended that the language should bear the judicial construction previously given to it.

Kirkpatrick *vs.* Gibson, 2 Brock., 388.

Commonwealth *vs.* Hartnett, 3 Gray, 450.

Section 14 of the act of July 14, 1862, was repealed by section eighteen of the act of June 30, 1864, (13 Stat. at Large, 216,) which enacted "that on and after the day and year this act shall take effect, there shall be levied, collected, and paid on all goods, wares, and merchandise, of the growth or produce of countries east of the Cape of Good Hope, (except raw cotton,) and imported from places west of the Cape of Good Hope, a duty of *ten per centum ad valorem*, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

Unless the court is prepared to declare that the omission of the conjunction "and" before the words "in addition to" indicates an intention to limit the application of this section to articles previously dutiable, (a construction which, in view of the loose language used in legislation, seems to counsel to be wholly untenable,) it is clear that the same construction must be put upon this act as was put upon the act of 1862—a construction strengthened by the special exception of raw cotton.

This section was substantially re-enacted in section 6 of the act of March 3, 1865, (13 Stat. at Large, 493,) which was in force when these goods were imported, the only difference being that the exception is extended to raw silk. The language is as follows: "That there shall be hereafter collected and paid on all goods, wares, and merchandise, of the growth or produce of countries [east] of the Cape of Good Hope, (except raw cotton, and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organzine,) when imported from places west of the Cape of Good Hope, duty of ten *per centum ad valorem*, in addition to t duties imposed on any such article when impor directly from the place or places of their growth production."

Vague theories as to the supposed policy of the (ernment are not entitled to much weight in consi ing the construction to be placed upon acts of Congr

Hadden *vs.* The Collector, *ubi supra.*

But if the policy or general intention of Government is to be considered at all, it is submitted that it favors the construction which has heretofore been placed upon these statutes by this court and by the court below.

The object of these additional duties was clearly to increase the revenue, which the exigencies of the Government rendered necessary. In distributing this additional burden, it would seem to be proper that those favored articles, which had heretofore been admitted free of duty, should bear some portion of it. If, besides this, it was the purpose of Congress to discriminate against the products of countries east of the Cape of Good Hope, when imported from places west of the Cape, there can be no conceivable reason why such discrimination should not apply to articles otherwise exempt from duty as well as to dutiable articles.

Laws imposing duties and taxes are not to be construed strictly against the Government, but liberally, so as to effectuate the purpose of the legislature.

Taylor *vs.* The United States, 3 How., 197, 210.
Cliquot's Champagne, 3 Wallace, 114, 145.
United States *vs.* Hodson, December Term, 1870.

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